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Nos. 91-1111 & 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., et al.,
Petitioners,

—v.—

STATE OF CALIFORNIA, et al.,
Respondents.

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, et al.,
Petitioners,

—v.—

STATE OF CALIFORNIA, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS IN No. 91-1128

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QUESTION PRESENTED

Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws, in light of this Court's teachings and contemporary understanding of international law, when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

This case involves complaints by nineteen states and numerous private plaintiffs that were consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation in MDL Docket No. 767.

Plaintiffs in the consolidated proceeding, who were also appellants in the Court of Appeals for the Ninth Circuit, were:

States: The States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, Washington, West Virginia, and Wisconsin.

State or Local Government Entities, Listed by State:

Alabama: City of Mobile; City of Birmingham

California: City of Lafayette; City and County of San Francisco; County of San Benito

Louisiana: City of Baton Rouge; City of New Orleans; City of Slidell; City of Nachitoches; City of Eunice

Massachusetts: Town of Hanover; Town of Milford

Montana: County of Teton

New York: Roosevelt Island Operating Authority, Inc.; Village of Croton; Village of Lake Success

Ohio: Township of Jackson; County of Hardin

Pennsylvania: County of Schuylkill; City of Altoona; City of York; Borough of Chambersburg

Washington: County of Cowlitz

West Virginia: City of Clay; County of Hancock; County of Mineral; County of Wirt

Private Plaintiffs: Big D Building Supply Corp.; Anastasios Markos, T/A Municipal Exxon; Bay Harbor Park Homeowners

Ass'n, Inc.; Environmental Aviation Sciences, Inc.; Carlisle Day Care Center, Inc.; Bensalem Township Authority; Keyboard Communications, Inc.; Glabman Paramount Furniture Mfg. Co., Inc.; Les-Ray Bobcat, Inc.; Jerry Grant Chemical Associates, Inc.; Durawood, Inc.; Carmella M. "Boots" Liberto Trading as R.J. Liberto, Inc.; Henry L. Rosenfeld; Acme Corrugated Box Co., Inc.; P&J Casting Corp.; Ace Check Cashing, Inc.

Defendants in the consolidated proceeding, who were also appellees in the Ninth Circuit, were, beside petitioners, the following:

Allstate Insurance Company; Aetna Casualty & Surety Company; CIGNA Corporation; General Reinsurance Corporation; Hartford Fire Insurance Company; Insurance Company of North America; Insurance Services Office, Inc.; Reinsurance Association of America; Thomas A. Greene & Company, Inc.; Ballantyne, McKean & Sullivan Limited; C.J.W. (Underwriting Agencies) Limited (sued herein as C.J. Warrilow-Hine & Butcher, Ltd.); Lambert Brothers (Underwriting Agencies) Limited (sued herein as J. Brian Hose & Others, Ltd.); R.K. Carvill & Co., Ltd; Continental Reinsurance Corporation (U.K.) Limited; Unionamerica Insurance Company, Ltd.; CNA Re (U.K.), Ltd.; Kemper Reinsurance London, Ltd.; Constitution Reinsurance Corporation; Mercantile & General Reinsurance Company of America; Prudential Reinsurance Company; North American Reinsurance Company; Winterthur Swiss Insurance Company; Excess Insurance Company, Ltd.; Excess Insurance Group, Ltd.; Terra Nova Insurance Company Limited.

Parent companies and subsidiaries (except wholly owned subsidiaries) of petitioners in No. 91-1128 are listed in the Petition for Writ of Certiorari in No. 91-1128, filed January 13, 1992, at iv (the "Petition"), and of the respondents joining in this Brief in their Response in Support of Petition for Writ of Certiorari pursuant to Rule 12.4 at i.

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BRIEF FOR PETITIONERS IN No. 91-1128

Petitioners Merrett Underwriting Agency Management Limited, Three Quays Underwriting Management Limited, Janson Green Management Limited, Murray Lawrence & Partners, D.P. Mann Underwriting Agency Limited, Robin A.G. Jackson, Peter N. Miller and Edwards & Payne (Underwriting Agencies) Limited respectfully submit their brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals is reported at 938 F.2d 919 (9th Cir. 1991). A-1-31.[1] The opinion of the district court is reported at 723 F. Supp. 464 (N.D. Cal. 1989). A-32-83.

JURISDICTION

The opinion of the court of appeals was entered on June 18, 1991. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on October 15, 1991. The Petition for Writ of Certiorari was filed on January 13, 1992, and this Court granted Certiorari on October 5, 1992. JA-308.[2] Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Sections 1 and 7 of the Sherman Act, 15 U.S.C. §§ 1 and 6a, respectively. Section 1 of the Sherman Act was enacted July 2, 1890. Section 7 of the Sherman Act was enacted October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act. The full texts of these provisions are reproduced in the Appendix to the Petition at A-93.

1 Numbers following the letter "A" denote reference to the Appendix to the Petition.

2 Citations in the form "JA" denote reference to the Joint Appendix.

STATEMENT

A. The Claims At Issue

Nineteen states and numerous private plaintiffs brought these antitrust actions in 1988 following a two-year long investigation in the United States and abroad. The plaintiffs represent persons who purchased or allegedly sought to purchase commercial liability insurance in the United States. State of California Complaint ("Cal. Compl.") ¶ 5.[3] This brief addresses only three claims ("the London reinsurance claims") in these actions, which allege that conduct engaged in by British subjects at the insurance and reinsurance marketplace known as Lloyd's of London, or by British insurance companies underwriting in London reinsurance markets, violated the U.S. antitrust laws. The plaintiffs in these three claims do not purport to purchase reinsurance in the London market. All the defendants in these claims are British subjects. Petitioners in No. 91-1128 are individuals and entities operating in the market known as Lloyd's of London. The other defendants in these claims are British corporations known as London Company reinsurers, and one broker.[4] *Id.* Each is involved in the business of reinsurance or retrocessional reinsurance in London. *Id.*

Reinsurance is insurance for insurers. Retrocessional reinsurance is reinsurance for reinsurers. London is one of the principal places around the world to which insurers turn to obtain reinsurance or retrocessional reinsurance of large and unique risks, which require the subscription of numerous underwriters to spread these risks. Other world markets for reinsurance include Munich, Zurich and Tokyo.

3 For convenience of reference, this brief cites only to the complaint filed by the State of California unless particular reference is made to another complaint. The complaints of the other plaintiff states and of most of the private plaintiffs, to the extent those latter complaints contain any detailed allegations, contain provisions parallel to those contained in the State of California complaint. The Cal. Compl. is found at JA-5-56.

4 These other defendants join in this brief to urge reversal of the decision below and dismissal of the London reinsurance claims.

Each of the London reinsurance claims attacks alleged agreements among London reinsurers over the coverage risks they were willing to accept. Through these claims, plaintiffs seek to modify the behavior of participants in the London reinsurance market, on the faulty hypothesis that the terms of reinsurance issued in London determine the terms of insurance issued in the U.S. This indirect effect provides the basis for assertion of jurisdiction over the London reinsurance claims.

The first of these three claims alleges that certain defendant London reinsurers agreed that they would only write reinsurance for liability risks on a claims made form.[5] Cal. Compl. ¶¶ 86-92; 131-135. Another alleges that the defendant London reinsurers, and one London reinsurance broker, agreed that their North American casualty (*i.e.*, liability) reinsurance treaties would contain a pollution exclusion term. *Id.* ¶¶ 93-96; 136-140. The final claim alleges a market agreement in the "LMX market," where retrocessional reinsurance coverage is provided solely to London-based underwriters. *Id.* ¶ 107. In this claim, plaintiffs assert that certain LMX reinsurers in London agreed in 1987 to include in their LMX retrocessional coverages an exclusion for North American property risks where the original property insurance coverage did not contain a seepage, pollution and contamination exclusion clause. *Id.* ¶¶ 106-110; 146-150.

The London-based conduct challenged in these three claims has long been subject to an intricate framework of regulation and competition law established by the British Government. Plaintiffs' complaints seek both compensatory and injunctive relief, but it is the injunctive relief that is central to these actions. Plaintiffs ask the U.S. court to silence the London reinsurance defendants, including petitioners, from making any public announcements about product restrictions, pricing behavior or loss reserve changes. Cal. Compl. ¶ 167. They ask

5 In general, a claims made form provides coverage only for claims made in the period in which the policy is in effect, while an occurrence form provides coverage for damage and injuries occurring during the policy period, regardless of when a claim is made.

the U.S. court to order the London reinsurers to withdraw any terms or conditions of coverage the London reinsurers have established in London in the exercise of their business judgment. *Id.* ¶ 174. They demand that the U.S. court order the London reinsurance broker defendants not to provide information to any reinsurer on prices, terms or conditions, except as the court may consider necessary for the negotiation of particular reinsurance contracts. *Id.* ¶ 176. They ask that the London reinsurers be ordered to divest themselves of any reinsurance affiliates. *Id.* ¶ 177. And they ask the U.S. court to monitor the compliance of the London reinsurers with the U.S. antitrust laws for the next ten years. *Id.* ¶ 181. Collectively, these proposed injunctive terms seek to restructure the fundamentals of the London reinsurance marketplace in which petitioners do business.

B. The Rulings Below

The British defendants named in the three London reinsurance claims moved before the district court to dismiss those claims for lack of subject matter jurisdiction and under principles of international comity. Noting that a two-year investigation had preceded the institution of the actions, the district court found none of the pertinent facts in dispute. A-69-71. The district court held that it possessed subject matter jurisdiction over the London reinsurance claims under the antitrust laws, because the complaints sufficiently alleged the requisite effect on American commerce. *Id.*

The district court declined to exercise that jurisdiction, however, under principles of international law and comity articulated by the Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*.[6] The district court concluded that "enforcement of the [U.S.] antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy." A-75. Having

6 549 F.2d 597 (9th Cir. 1976) (*"Timberlane I"*), *appeal after remand*, 749 F.2d 1378 (9th Cir. 1984) (*"Timberlane II"*), *cert. denied*, 472 U.S. 1032 (1985).

carefully assessed each of the factors set forth in *Timberlane* as pertinent to considerations of comity, the district court further concluded that "[t]he conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Recognizing that the conduct alleged had at best attenuated effects in the United States, the district court added:

> Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

A-78.

On appeal, the court of appeals agreed that the exercise of jurisdiction would result in "conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance." A-31. The court of appeals nonetheless reversed, holding that the "significant conflict with English law and policy" was outweighed by plaintiffs' allegation that the British defendants' actions in England had direct, substantial and reasonably foreseeable effects in the United States. A-29-31. The court of appeals treated these effects as virtually dispositive: "[i]f a complaint survives the new bar of 15 U.S.C. § 6a (the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")) because the conduct has a 'direct, substantial, and reasonabl[y] foreseeable effect' on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." A-28. The court of appeals did not discuss at all one of the central factors in any analysis of a problem in conflict of laws or extraterritorial jurisdiction: the locus of the relevant conduct.[7]

7 The court of appeals also found it significant that some of the British defendants in these claims are subsidiaries of American corporations (A-29), even though those parents are not named in the complaints and there are no allegations that any parent company played any role in the events complained of. Petitioners here have no American parents, subsidiaries or affiliates. The unpleaded assertion of the parentage of the other defendants in these claims, which is not even correct as to all of the London Company defendants, is irrelevant. They are British citizens operating in the same London reinsurance markets as petitioners.

SUMMARY OF ARGUMENT

With this petition, the Court has assumed the task of assessing the extent to which the United States should exercise jurisdiction to apply its economic regulatory laws to activity centered abroad. The precedents of this Court demonstrate that an "effects" or minimum contacts analysis provides an incomplete jurisdictional basis where the international community has an interest. The circuit court precedents, and two generations of Restatements, teach not only that principles of international law and comity should lead a U.S. court to look beyond whether conduct engaged in outside the U.S. has an effect in the U.S., but also that courts must assess the extent to which the interests of other nations might be infringed. The leading authorities have developed several factors to be weighed in conducting this analysis. Because a primary goal of international law principles is the avoidance of conflict, the most critical of these factors is conflict with the law or policy of another nation. Unless outweighed by other factors, conflict with the law or policy of a foreign nation has itself been found a reason to decline the exercise of jurisdiction.

Petitioners urge this Court to endorse expressly the principles of international law and comity developed to date by scholars and in the opinions of the lower courts, which require moderation in the exercise of jurisdiction to apply U.S. law and make conflict with the law and policy of a foreign state a keystone in the analysis. When it applies these principles to the present case, petitioners believe the Court must conclude that the district court correctly declined to exercise jurisdiction over the three London reinsurance claims, and that the court of appeals' reversal of that decision was incorrect.

Only the district court's application of U.S. law gave proper respect to principles of international law. Both courts below concluded that the exercise of jurisdiction over the London

reinsurance claims would create a significant conflict with English law and policy, because application of the U.S. antitrust laws and imposition of the relief sought would usurp the detailed regulatory framework the British Government has put in place for its insurance industry. The court of appeals, however, departed from modern precedent and leading authority to reverse the district court. The court of appeals erroneously gave dispositive weight to the alleged effects of the conduct at issue on U.S. commerce. The court of appeals thus misapprehended or disregarded principles of international law, and failed to acknowledge the impact of conflict on the international legal order and the interests of the foreign state concerned.

Congress decided in 1945 to exempt the business of insurance in the United States from federal antitrust law, on the dual ground that certain types of agreements not generally permitted under the antitrust laws were necessary to the sound conduct of the business of insurance, and that the individual states could more appropriately regulate this industry. It occurred to no one at the time that U.S. antitrust law would be applied to agreements made by foreign insurers acting abroad. To hold foreign insurers subject to the U.S. antitrust laws from which domestic insurers were exempt, as the court of appeals decision permits, would be perverse. Congress could not have intended a result so wholly inconsistent with principles of international law.

ARGUMENT

I. Extraterritorial Jurisdiction By A U.S. Court Must Be Tempered By Restraint To Accommodate Principles Of International Law And Comity And To Avoid Conflict

A. International Law And The Limits On U.S. Jurisdiction

The modern law of the scope of United States jurisdiction over activity centered abroad can be traced to *United States v. Aluminum Company of America*, 148 F.2d 416, 443-45 (2d Cir. 1945) ("Alcoa").[8] In *Alcoa*, the court held that a system of quotas for imports, although established abroad, was intended to affect the United States market, and that an effect on the United States market sufficient to support subject matter jurisdiction could be inferred from that intent.

Even with the jurisdictional sweep of *Alcoa*, however, Judge Learned Hand expressly noted that Congress must be presumed to have acted against a backdrop of deference to other nations required by international law and custom:

> [W]e are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the "Conflict of Laws."
>
> * * *
>
> Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

Id. at 443.

Following *Alcoa*, courts in both the United States and the United Kingdom considered the impact that exercise of legislative jurisdiction by the U.S. would have in the U.K. in the *Nylon Spinners* cases. The American court, in *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952), ordered the British defendant not to enforce its British patents to exclude imports of nylon into the United Kingdom.

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8 The court, consisting of L. Hand, Swan, and A. Hand, was sitting as a court of last resort, after the Supreme Court was unable to muster a quorum to hear the case. *See* Act of June 9, 1944, c. 239, 58 Stat. 272, now 28 U.S.C. § 2109 (West 1987).

The court moderated the operation of its decree in recognition of the fact that more than one nation can possess jurisdiction over a matter, and that restraint might then be appropriate:

> No provision of this judgement shall operate against I.C.I. for action taken in compliance with any law of . . . any foreign government or instrumentality thereof, to which I.C.I. is at the time being subjected, and concerning matters over which, under the law of the United States such foreign government or instrumentality thereof has jurisdiction.[9]

In three cases involving foreign seamen, this Court held that Congress must be presumed to have acted with respect for principles of international law and comity when it employed general phrases such as "in trade or commerce" in the Sherman Act or "any seaman." *Lauritzen v. Larsen*, 345 U.S. 571 (1953), involved a claim under the Jones Act[10] by a foreign seaman who had signed his ship's articles in New York. This Court, reversing two lower courts, wrote that the exercise of jurisdiction to apply U.S. law must be informed by deference to "a non-national or international maritime law of impressive maturity and universality":

> It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.
>
> * * *

9 *British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd. (II)*, [1955], Ch. 37 at 53, 3 All E.R. 88. In the English proceeding, the English Court of Appeal ordered the British defendant to honor its English contract granting an exclusive license to another British company, concluding that "the writ of the United States does not run in this country, and if due regard is had to the comity of nations, it will not seek to run here." *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 at 28, [1952] All E.R. 780 (Lord Denning).

10 Jones Act, 46 U.S.C. § 688 (West Supp. 1992).

> It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

345 U.S. at 581-83.

Six years later, in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), which involved a claim by a foreign seaman injured in the U.S., the Court rejected a minimum contacts analysis and emphasized that international interests may require restraint in the exercise of jurisdiction:

> The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations.

358 U.S. at 383. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which involved an attempt to assert jurisdiction over foreign seamen by the N.L.R.B., this Court reiterated the presumption that Congress intended to legislate in harmony with international law:

> We therefore conclude . . . that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."

372 U.S. at 20-22 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

Taken together, this Court's decisions in the *Lauritzen*, *Romero* and *McCulloch* trilogy confirm that the United States cannot exploit every contact with its shores to the full extent of its power. It is not minimum contacts, but the presumed intent of Congress to respect principles of international law and comity, that provides the initial test for application of U.S. regulatory law to foreign-centered conduct or transactions. As Mr. Justice Frankfurter observed, this nation's interests are best served by acting with "respect for the relevant interests of foreign nations in the regulation of [international] commerce as part of the legitimate concern of the international community." *Romero*, 358 U.S. at 382.

The theme that the domestic regulation of international commerce must be undertaken with due regard for the interests of the international community found its next expression in the American Law Institute's *Restatement (Second) of The Foreign Relations Law of the United States* (1965). In section 40, the *Restatement* accepted the view that, before jurisdiction to apply a state's regulatory law could be exercised on the basis of the effects doctrine, the state was "required" to take into account the interests of other concerned states.[11] Section 40 presaged the later work of the lower courts by identifying the cardinal factors to be weighed in assessing the extraterritorial reach of jurisdiction, each of which would weigh against the assertion of jurisdiction over these claims.

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11 The text of section 40 provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and

The Court has continued to uphold the rule that extraterritorial application of American statutory law should not be presumed without explicit congressional guidance and, hence, has instructed U.S. courts that they are not to apply terms such as "high seas," "the people," "any place" or "foreign commerce" in legislative grants of jurisdiction to wholly foreign events or actors. Most recently, in *EEOC v. Arabian American Oil Co.* ("*Aramco*"), ___ U.S. ___, 111 S. Ct. 1227 (1991), the Court held that Title VII does not apply to actions of an *American* employer taken as to *Americans* employed abroad, notwithstanding the statute's facial application to "commerce" between a state and "any place":

> It is a long-standing principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros.*, 336 U.S., at 285, 69 S.Ct., at 577. This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Ibid.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 677-78, 9 L.Ed.2d 547 (1963).

111 S. Ct. at 1230. Without clear evidence of congressional intent, the Court was unwilling to attribute to Congress "a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce." *Id.*[12]

> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.
>
> *Restatement (Second)* § 40.

12 Even the dissent in *Aramco* acknowledged that the Court's strict historical presumption against the extraterritorial application of American law properly "permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a

B. *The Importance Of Avoiding Conflict In Assessing Whether The Exercise Of U.S. Antitrust Jurisdiction Is Reasonable*

Until this case, this Court has not had before it an application to U.S. antitrust law of the principles reflected in its decisions. In *Timberlane Lumber Co. v. Bank of America*, the Court of Appeals for the Ninth Circuit explored that issue. In *Timberlane*, the American plaintiffs alleged that a group of Honduran citizens had conspired with Bank of America to drive them out of the lumber business in Honduras, in violation of the Sherman Act. The Honduran lumber was intended for the American market, and Timberlane therefore alleged a "direct and substantial effect on United States foreign commerce." 549 F.2d at 605. Defendants argued that their conduct was beyond the reach of U.S. law because the conduct took place predominantly in Honduras. The district court dismissed the action, and plaintiffs appealed.

The Ninth Circuit expressly rejected the suggestion in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-57 (1909), that the Sherman Act did not apply outside United States territory. The court of appeals continued, however, to consider the *Alcoa* effects doctrine:

> The effects test [as enunciated in *Alcoa*] by itself is incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country. Whether the alleged offender is an American citizen, for instance, may make a big difference; applying American laws to American citizens raises fewer problems than application to foreigners.

549 F.2d at 611-12.

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statute to displace the domestic law of another nation." *Id.* at 1239 (Marshall, J., dissenting). The dissent argued that because "application of United States law to *United States nationals* abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to *foreign nationals* abroad," a statute could be construed "to apply extraterritorially to United States nationals but *not* to foreign nationals." *Id.* at 1244 (emphasis in original).

Under *Timberlane*, a finding that activity centered abroad has a "substantial and direct" effect on U.S. commerce is the first step in the jurisdictional analysis because without sufficient effects, the assertion of United States regulatory jurisdiction lacks a constitutional foundation. But under *Timberlane*, this finding is only the beginning of the analysis:

> A tripartite analysis seems to be indicated. As acknowledged above, the antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-á-vis those of other nations, to justify an assertion of extraterritorial authority.
>
> It is this final issue which is both obscured by undue reliance on the "substantiality" test and complicated to resolve. An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness.

549 F.2d at 613 (emphasis in original).

The Ninth Circuit set forth a "jurisdictional rule of reason" under which a court would weigh the following factors to assess the propriety of an extraterritorial application of jurisdiction:

1. the degree of conflict with foreign law or policy;
2. the nationality or allegiance of the parties and the locations or principal places of business of corporations;

3. the extent to which enforcement by either state can be expected to achieve compliance;
4. the relative significance of effects on the United States as compared with those elsewhere;
5. the extent to which there is explicit purpose to harm or affect American commerce;
6. the foreseeability of such effect;
7. the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 613-14.

Judge Choy's opinion in *Timberlane* relied on the pioneering work by Professor Kingman Brewster on the extraterritorial application of the antitrust laws, which emphasized the importance of assessing the extent of conflict with the law and policies of foreign states.[13] On appeal after remand the Ninth Circuit, per Judge Sneed, stressed that a significant conflict with foreign law or policy "unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction . . . ." 749 F.2d at 1384.

Three years after *Timberlane*, the Court of Appeals for the Third Circuit applied comity principles to decline to exercise jurisdiction in an action under the Sherman Act. In *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), the Third Circuit set forth its own list of factors it believed courts should employ to weigh competing sovereign interests in economic regulation. Like the Ninth Circuit, the Third Circuit placed degree of conflict with foreign law or policy first, and it endorsed all of the other *Timberlane* factors. The *Mannington Mills* court amplified the list of factors appropriate to comity considerations principally by asking whether the United States would accept the proposed relief if it were applied by a foreign court, and by considering the possible

13 K. Brewster, *Antitrust and American Business Abroad* 466 (1958), *quoted in Timberlane*, 549 F.2d at 614 n.31.

effect of the exercise of jurisdiction on the foreign relations of the United States.[14] Under either set of factors, a court should not exercise jurisdiction over the London reinsurance claims.

In 1987, the American Law Institute published *Restatement (Third) of The Foreign Relations Law of the United States* (1987), which in significant part focused on the relation of international law to the exercise of jurisdiction over transnational activity by national governments and courts. The guiding rule, as set forth in sections 402 and 403 of the *Restatement*, is the principle of reasonableness in the exercise of jurisdiction. In the *Restatement's* view, under international law—and under the law of the United States—even when one of the bases of jurisdiction to prescribe and apply a nation's law is present (*i.e.*, there is either a link of territoriality or a link of nationality), jurisdiction may not be exercised when it would be unreasonable to do so.

The *Restatement* also sets out a list of factors, similar to those proposed by Professor Brewster, *Timberlane* and *Mannington Mills*, to be considered in determining whether the exercise of jurisdiction would be reasonable. These factors focus on the teachings and traditions of the international legal system and on the character of the activity sought to be regulated.[15] Within the framework of the general principle, the

14 The Third Circuit's list of factors included: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign national under similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue. *Mannington Mills*, 595 F.2d at 1297-98.

15 Section 403(2) of *Restatement (Third)* provides:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(footnote continued)

Restatement sets out rules for exercise of particular types of jurisdiction, such as taxation, securities regulation and antitrust.

The authors of the *Restatement* understood that it is possible that more than one state can have a sufficient basis for exercising jurisdiction to apply its law to the same conduct. In some situations, each state could exercise jurisdiction without interfering with predominant interests of the other. But when the regulatory schemes of the two states applicable to a given activity are in fundamental conflict, the *Restatement* calls for the state with the lesser interest—generally the non-territorial state—to withhold exercise of its jurisdiction.[16] Section 415

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

16 Section 403(3) of *Restatement (Third)* provides:

> When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, [including those set out in] Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

applies the principles of sections 403(2) and 403(3) to agreements in restraint of trade.

One thread runs through all the precedents: conflict between the laws and regulatory policies of two states is to be avoided, for two independent reasons. *First*, individual parties should not be placed in the position where by acting in accord with one law, they violate another. *Second*, governments should not be drawn into avoidable clashes by decisions of courts, particularly in disputes in which the governments have not themselves participated and over which they have no control. Moreover, each of these precedents supports the result reached by the district court, which employed a decisional framework honoring the principle that in international commerce, conflict in the application of regulatory jurisdiction should be avoided. The court of appeals failed to recognize this principle, and its decision should be reversed.

II. The Court Of Appeals Misapplied The Sherman Act And Failed To Give Sufficient Weight To This Court's Precedents And Other Governing Authorities

A. The Foreign Trade Antitrust Improvements Act Does Not Affect The Rule That The Exercise Of Extraterritorial Jurisdiction Must Be Reasonable

The court of appeals made a fundamental error in its consideration of the comity principles enumerated in *Timberlane*. The court of appeals interpreted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (West Supp. 1992),[17] to

17 Section 7 of the Sherman Act, 15 U.S.C. § 6a, enacted on October 8, 1982, as part of the Foreign Trade Antitrust Improvements Act, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

reflect the intent of Congress that a substantial effect in the U.S. was all—or practically all—that mattered in the exercise of jurisdiction: "If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a 'direct, substantial, and reasonabl[y] foreseeable effect' on American commerce," the court of appeals wrote, "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction." A-28. This position manifests a complete misunderstanding of both the text of the FTAIA and the intent of Congress.

The FTAIA is a 1982 amendment to the Sherman Act, enacted in response to the perception that American exporters were handicapped by uncertainty about their exposure to antitrust liability if they entered into joint ventures or other types of agreements designed to improve their sales in foreign markets. *See, e.g.*, testimony of Hon. Malcolm Baldrige, Secretary of Commerce, in *Foreign Trade Antitrust Improvements Act*, Hearings before Subcomm'n on Monopolies and Commercial L. of House Comm'n on the Judiciary, at p. 6 (97th Cong., 1st Sess. March 28, 1981). Congress adopted the Export Trading Company Act of 1982, Pub. L. 97-290, 96 Stat. 1233, in order to

> increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular . . . by modifying the application of the antitrust laws to certain export trade.

15 U.S.C. § 4001(b) (West Supp. 1992).

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for the injury to export business in the United States.

Title IV of the Export Trading Company Act, which became known as the FTAIA, undertook to exempt from the antitrust laws conduct that might be thought to be covered by those laws because it took place in the United States (*i.e.*, based on territorial jurisdiction) but did not have the requisite (*i.e.*, direct and substantial) effect within the United States. *Foreign Trade Antitrust Improvements Act*, Report of House Comm'n on the Judiciary, H.R. No. 686, 97th Cong., 2d Sess., at 10 (Aug. 2, 1982), *reprinted in* 1982 U.S.C.C.A.N. 2495 (hereinafter "House Report"). Thus export transactions were exempt under the FTAIA if they did not injure the domestic economy. Import transactions were left unaffected, except that Congress added the words "direct, substantial and reasonably foreseeable" before the word "effect," to codify the understanding that had emerged from the cases following *Alcoa* rejecting the notion that "minimum contacts" could support extraterritorial jurisdiction. *See* House Report pp. 8-9, 1982 U.S.C.C.A.N. 2493-94.

In addition, Congress clearly contemplated the prospect that courts would weigh the reasonableness of asserting jurisdiction, and thought that *Timberlane* represented the kind of comity analysis that ought to be applied:

> Moreover, the bill [was] intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter-jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane* [I], or otherwise to take account of the international character of the transaction.

House Report at 13, 1982 U.S.C.C.A.N. at 2498.

Read in light of this legislative history, the court of appeals' importation of the FTAIA subject matter jurisdiction test into its consideration of comity was wholly unfounded. The London reinsurance claims do not encompass any territorial conduct that would support jurisdiction absent the exemption Congress created. Congress intended to leave otherwise undisturbed the

developing law on the exercise of jurisdiction. Congress did not intend any truncation or alteration of the analysis courts should undertake in assessments of comity, nor would it have made any sense for it to have done so in the context in which the FTAIA was enacted.

The court of appeals' erroneous importation of the FTAIA's test into the comity analysis vitiated the role of the conflict it had found, and infected the court's evaluation of the relevant factors. Its misinterpretation of the statute elevated "effects" to a higher level than all the factors that ordinarily establish the links for the extraterritorial exercise of jurisdiction, such as nationality of the defendants and locus of the conduct. The court of appeals thus effectively reversed the observation of Judge Choy in *Timberlane* that finding an effect in the United States is only the beginning, and not the end, of the analysis. 549 F.2d at 611-12.

B. Comity Principles Require That The Exercise of Jurisdiction Over The London Reinsurance Claims Must Be Declined

i. Application Of The U.S. Antitrust Laws To The London Reinsurance Claims Would Result In Significant Conflict With The Law And Policy Of The United Kingdom

The relief sought against the London reinsurers for their alleged violations of the U.S. antitrust laws invades the regulatory jurisdiction of the British Government. Plaintiffs seek a fundamental reworking of basic practices in the regulated London insurance markets. The district court found, and the court of appeals agreed, that enforcement of the U.S. antitrust laws in this case would supplant the regulatory and competitive framework of the London reinsurance market set in place by the British Government. The British Government, through its repeated appearances *amicus curiae* in these proceedings, concurs, and asks that this conflict be avoided. As stated in its earlier brief, "[T]he conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the district court properly found was 'conducted in conformity with English law . . . [for] a legitimate business purpose.' . . . It is for the British Parliament in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system". *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners* at 9 (quoting A-76).

Reinsurance in the London insurance markets is written through the subscription of several underwriters to portions of each risk. *See* A-67. In these markets, the Lloyd's petitioners and the London Company defendants participate in the same business, share the same risks, sign on to the same insurance slips, and negotiate with the same brokers. They are regulated under the same comprehensive British regulatory scheme for insurers. That scheme is designed to assure solvency (and, hence, the reliability and security of insurance), and to protect the continued contributions of this very significant segment of the British economy. *See generally* T. Henry Ellis and James A. Wiltshire, I *Regulation of Insurance in the United Kingdom and Ireland*, Chapter B (1992).

The United Kingdom has chosen to implement its comprehensive regulatory scheme differently for Lloyd's underwriters than for London Company underwriters. The British scheme accommodates the 300-year history of the Lloyd's of London marketplace. It provides for regulation by Lloyd's to safeguard the solvency of Lloyd's underwriting syndicates and the reliability of policies issued in the Lloyd's name, but it also preserves the ultimate authority of Parliament to alter the regulatory framework applicable to the Lloyd's market, and the more immediate authority over the insurance industry of the Department of Trade and Industry. The provisions of law governing Lloyd's specifically are set forth in the Lloyd's Acts 1871-1982.[18]

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18 Petitioners have lodged with the Clerk of the Court copies of the Lloyd's Act 1982, incorporating those sections of the Lloyd's Acts 1871-1951 currently in force.

The Lloyd's Acts have been altered, amended and revised many times by Parliament, most recently in 1982. The guiding spirit of the Lloyd's Act 1982 is one of self-regulation,[19] but still subject to Parliament's ultimate authority, within the framework of the general law and dependent on a high degree of mutual trust among the market's participants. Through its own bylaws and regulations, Lloyd's devotes meticulous attention to safeguarding the security of insurance at Lloyd's by regulating and monitoring the solvency of those who underwrite there, endeavoring to ensure that the amount of insurance underwritten annually by each syndicate does not exceed its capacity, and prohibiting the underwriting of certain types of insurance. For example, with certain exceptions, Lloyd's does not permit the underwriting of coverage for war damage to land-based property risks, on the theory that the accumulation of claims for war-imposed damage on land could destroy the market's solvency. *See* Hugh Cockerell, *Lloyd's of London—A Portrait* 112 (1984).

The London Company defendants named in the London reinsurance claims,[20] each of which is incorporated in the United

19 The Lloyd's Act 1982 was the product of a committee appointed by Parliament under the chairmanship of former British High Court Judge Sir Henry Fisher. The committee's report, entitled *Self-Regulation at Lloyd's: Report of the Fisher Working Party* (May 1980), took note of the unique structure of Lloyd's and concluded:

> **We have no doubt that Lloyd's will be best served by a properly conducted system of self-regulation.** Indeed, we do not see how it could function in anything like its present form under any other system of regulation. Since the continued success of Lloyd's as an international market for insurance is important in the national interest, it is of national importance that Lloyd's should have an efficient system of self-regulation.

Fisher Report at 3 (emphasis in original).

20 The London Company defendants are not petitioners here but have joined this brief as additional parties. They are alleged to have joined in precisely the same agreements and on precisely the same terms as those petitioners named in the Sixth and Eighth claims of the State of California complaint. They are not named in any other aspect of that complaint, although they, with all other defendants, are included in a "global

Kingdom in accordance with the Companies Act 1985, are regulated for solvency, and in other aspects of their business, by the Insurance Companies Act 1982 and other regulations, under the supervision of the Secretary of State for Trade and Industry. *See* J. Butler, et al., *Reinsurance Law* ¶ A.1.1 at A.1.1-2 (1989).[21] The Insurance Companies Act 1982 imposes restrictions on the carrying on of certain classes of the insurance business and regulates transfer of business, insolvency, and winding up. The Act provides wide powers of intervention to the Department of Trade and Industry. The Act governs the form and content of insurance advertisements and requires insurance intermediaries to disclose prescribed information to potential insureds.

In addition to these insurance regulatory Acts, Parliament has created exceptions for British insurers in its laws of general application. As under U.S. law, British law expressly exempts agreements among British insurers on rates or terms and conditions of coverage from application of the Restrictive Trade Practices Act, the relevant English competition law. Restrictive Trade Practices (Services) Order, S.I. 1976 No. 98. JA-258-263. Similarly, the Unfair Contract Terms Act 1977 contains special provisions distinguishing insurers from other entities to which that Act applies.

Disregarding the unique blend of law, custom and policy through which the London reinsurance market operates and the British Government regulates, plaintiffs seek through this action to impose on petitioners a program to be crafted in San Francisco for the underwriting of reinsurance in London. Plaintiffs would have the district court enjoin communications among underwriters in London and between London underwriters and brokers on coverage terms. *See, e.g.*, Cal. Compl. ¶ 171 (enjoining communications among each other regarding

conspiracy" claim added to some subsequently filed complaints and dismissed by both courts below.

21 For a history of the United Kingdom's "comprehensive approach" to regulation of its insurance industry, *see generally* Robert Merkin, *Colinvaux's Law of Insurance* 212 (6th ed. 1990).

forms or terms and conditions of coverage); *id.* ¶ 172 (same but of greater breadth); *see also* Connecticut Complaint ("Conn. Compl.") ¶ 156 (enjoining communications among broker and reinsurer defendants regarding prices, terms or conditions of coverage).[22] These remedies threaten to undermine the unique risk-spreading mechanism of the London marketplace, which permits many large and novel risks to be presented for insurance and reinsurance there. No one, least of all a U.S. court, can predict how the measures on which plaintiffs insist might affect the London insurance and reinsurance markets, whose size, stability and innovation are replicated nowhere.[23]

Furthermore, it is the United Kingdom's position that international law precludes application of U.S. antitrust laws to British subjects for most conduct undertaken in their own country. This position is reflected in Parliament's enactment of the Protection of Trading Interests Act 1980 ("PTIA").[24] Under the PTIA, British courts will not enforce antitrust damage decrees. English law treats multiple damage awards, like punitive damage awards, as penal in nature, and the English courts will not enforce them. Moreover, as both courts below agreed, there is virtually no likelihood that English courts will enforce injunctive decrees entered by American courts directing the conduct of British subjects. *See* A-75-76, citing *Nylon Spinners*; A-30.

The fundamental alterations for which plaintiffs press in these actions cannot be effected without displacing the British Government's regulatory choices. Both courts below understood this, yet they reached opposite conclusions about the wis-

22 The Conn. Compl. is found at JA-57-102.

23 Plaintiffs also overreach with their demand for "divestment." They would have the district court order and enjoin each defendant "to divest itself of any and all reinsurance and brokerage affiliates, subsidiaries or other operations," Cal. Compl. ¶ 177, and to divest itself of all non-reinsurance operations. *Id.* ¶ 179. Like plaintiffs' proposed restructuring of the day-to-day operation of the London reinsurance market, both of these terms would conflict directly with the British Government's judgment about the degree of integration appropriate for the London insurance market.

24 JA-281-290.

dom of permitting the London reinsurance claims to proceed. Given the gravity of the conflict, and the British Government's unequivocal expression of its position on international law, petitioners submit that the district court reached the only correct conclusion.

ii. No Factors Outweigh The Significant Conflict With The Law And Policy Of The United Kingdom

The district court found nothing of sufficient weight in its assessment of other factors to warrant the exercise of jurisdiction. Its decision embodies reasonableness, not only because it avoids conflict, but also because under the totality of other circumstances before it, the exercise of jurisdiction would have tread upon sovereign interests for little or no purpose. In the words of Judge Choy in *Timberlane*, the district court properly found "the interests of the United States . . . too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." 549 F.2d at 609.

Specifically, the district court found the conduct at issue in the London reinsurance claims, and the actors who took part in it, to be remote from the U.S. A-75. The district court also recognized that, unlike a claim of fraudulent conduct or price-fixing, a legitimate business purpose existed for the conduct complained of. A-76-77 ("The conduct of defendants complained of in these claims was directed primarily at reducing their exposure to certain risks and controlling losses, a legitimate business purpose"). In addition, the district court found that the exercise of jurisdiction would have been futile, because neither injunctive terms seeking to restructure London insurance market operations, nor a treble damages remedy, were likely to be enforced in Britain. Faced with an indisputable risk to foreign relations had it permitted the claims to proceed, the existence of wholly foreign conduct by wholly foreign actors, and the inability to enforce a remedy if one were obtained, the district court was compelled to follow a course that avoided the cost of conflict.[25]

25 Avoidance of that conflict was even more essential here, where plaintiffs do not claim to have purchased the reinsurance products offered by the British defendants and, thus, must find their real relief elsewhere.

The court of appeals did not disagree with the salient features of the district court's analysis. The court of appeals agreed that a significant conflict "with a long-established British policy towards a venerable British trade, the underwriting of insurance" existed:

> The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." [723 F. Supp.] at 489. The British brief reiterates that conclusion; we do not doubt its accuracy.

A-29, 31. The court of appeals agreed that all of the defendants in the London reinsurance claims are British, A-29-30, a predicate which, alone, raises serious questions of international comity. *Aramco*, ___ U.S. ___, 111 S. Ct. 1244 (Marshall, J., dissenting), discussed in note 12 *supra*; *see also Restatement (Third)* § 403(2)(b). The court of appeals acknowledged that a legitimate business purpose existed for the conduct at issue. A-30-31. The court of appeals also agreed that the decree of a district court could not be enforced abroad, although it otherwise omitted comment on the foreign locus of the conduct. A-30.

Neither court asked, as one would under *Mannington Mills*, how the proposed relief would appear if it had been ordered by a foreign court for application to U.S. insurers for conduct legal in this country and subject to regulation by the 50 states. 595 F.2d at 1287. Had either court examined this factor, it would have found that it weighed heavily against the exercise of jurisdiction, particularly if the party seeking relief were a local government.

Notwithstanding its agreement with the district court on the factors central to the comity analysis, the court of appeals stretched to reach a different result. It focused on the fact that plaintiffs are American, even though the comity inquiry should focus on the nationality of the parties against whom relief is sought. Similarly, it focused on the American parentage of some of the British defendants, even though those parents are not alleged to have participated in the conduct at issue. And it believed, for some reason, that it could fashion relief through orders directed to "American insurers" (A-30), even though there are no American defendants in the London reinsurance claims.

The court of appeals was obviously overwhelmed by its perception that "substantial" effects had been established to overcome the "new bar" of the FTAIA. With its vision thus obscured, the court ignored the warning of Judge Choy in *Timberlane* and placed "undue reliance on the 'substantiality' test." 549 F.2d at 613. The court of appeals replaced a correct decision applying a jurisdictional rule of reason to avoid unnecessary conflict, with an incorrect decision in which "effects" were determinative. Its ruling should be reversed.

III. Congress Could Not Have Intended To Expose Foreign Insurers To Antitrust Liability Greater Than That To Which U.S. Insurers Are Exposed

In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (West 1976), Congress preserved regulation of the business of insurance to the domain of the states. Throughout hundreds of pages of hearings, congressional committee reports, and contemporaneous comment, there is not the slightest hint that Congress had in mind the additional intent to apply U.S. law to foreign insurers or reinsurers.

It is possible to conclude (1) that neither the domestic insurers nor the foreign insurers are liable—as the district court held; (2) that the domestic insurers may be found liable through further proceedings, on the ground that their alleged conduct comes under the boycott exception to the McCarran-Ferguson Act, but the foreign insurers are not liable because, as argued herein, jurisdiction under the Sherman Act does not reach them; or (3) that both the domestic and the foreign insurers may be found liable, if the domestic insurer petitioners fail on their McCarran Act argument, and the foreign insurers fail on the arguments made in this brief. It is not possible to conclude, as the court of appeals suggests, A-31, that (4) even if the domestic insurers are not liable because their alleged conduct

is immunized by the McCarran-Ferguson Act, the foreign defendants may nevertheless be liable for analogous conduct undertaken in Britain. No conceivable intent of Congress would support a conclusion that would discriminate against foreign insurers; indeed, consistent with principles of international law and the precedents discussed above, Congress presumably intended the contrary.

CONCLUSION

Six years ago in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-116 (1987), this Court called for consideration of the procedural and substantive policies of other nations in determining whether exercise of adjudicatory jurisdiction by a California court over foreign parties was acceptable and lawful. This case involves the exercise of jurisdiction by another court in California, but the question is much more serious—and much more directly affects the interests of the foreign nation concerned—because the exercise of jurisdiction would involve not just haling defendants before a court in the United States, but applying United States law to their foreign conduct, which is subject to pervasive economic regulation by a foreign sovereign. Permitting these claims to proceed would give the plaintiffs license to reorganize regulated markets worldwide—in Munich, Zurich, Tokyo and elsewhere.

The interests of foreign states, as well as the United States' interest in its foreign relations policies, will best be served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case. Upon such a careful inquiry here, it is clear that the district court was correct, and that the London reinsurance claims should be dismissed.

For the reasons stated, the decision of the court of appeals should be reversed, and the decision of the district court dismissing the London reinsurance claims should be reinstated.

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